SERVED: January 25, 1996

NTSB Order No. EM-181

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 4th day of January, 1996

J. W. KIME, Commandant, United States Coast Guard, v. MICHAEL L. WILLIAMS, Appellant.	Docket ME-161

OPINION AND ORDER

Appellant, by counsel, seeks review of a decision of the Vice Commandant (Appeal No. 2566, dated May 2, 1995) affirming a decision and order entered by Coast Guard Administrative Law Judge Bernard L. Silbert on December 1, 1992, following a two-day evidentiary hearing that concluded on October 21, 1992.[1] The law judge sustained a charge of misconduct and ordered that the

[1]Copies of the decisions of the Vice Commandant and the law judge are attached.

appellant's Merchant Mariner's License (No. 659384) and Document (No. 569-58-5167-D1) be suspended outright from May 6, 1992 through August 21, 1992 (during which period they had been voluntarily surrendered to the Coast Guard pursuant to 46 C.F.R. § 5.105(c)), along with an additional three month suspension remitted on twelve months' probation. As we find no valid basis in appellant's assignments of error for overturning the Vice Commandant's affirmance of the law judge's decision, appellant's appeal, to which the Coast Guard filed a reply in opposition, will be denied.

The misconduct charge against the appellant involves his service as an operator, while employed as a mate, aboard the M/V SEA VIKING on March 20, 1992, as it proceeded toward Seattle via Admiralty Inlet. The one specification upheld by the Vice Commandant in support of the charge alleged that appellant, who had asked a deckhand to watch the con so that he could take a head break, had violated 46 U.S.C. § 8904(a) by permitting "an unqualified and unlicensed individual to assume direction and control" of the vessel when, the record discloses, it was overtaking another vessel traveling in essentially the same direction some 100 to 250 yards distant.[2] During appellant's absence of about 3 minutes the SEA VIKING collided with that

[2]46 U.S.C. § 8904(a) provides that a "towing vessel that is a least 26 feet in length ... shall be operated by an individual licensed by the Secretary to operate that type of vessel in that particular geographic area...."

vessel, the F/V LEVIATHAN, and it shortly thereafter sank.[3]

On appeal to the Board, appellant raises some of the same objections he presented to the Vice Commandant.[4] Although we find that none of appellant's contentions justifies a reversal of the Vice Commandant's decision,[5] two of them warrant some comment.

Appellant renews here his contention that because the M/V SEA VIKING was not engaged in a towing activity at the time of the collision, it cannot be considered a "towing vessel," under the relevant definition in 46 U.S.C. § 2101(40), and he, therefore, cannot be held to have violated the law's requirement, in 46 U.S.C. § 8904(a), that only a properly licensed individual can operate such a vessel.[6] The Vice Commandant rejected appellant's position, noting that it did not take into account

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[3]Unlike the law judge, the Vice Commandant was not persuaded that the evidence of record was sufficient to establish two other specifications advanced in support of the misconduct charge; namely, that appellant had violated Rules 13 (failure to take adequate precautions in an overtaking situation to avoid a collision) and 16 (failure to keep well clear of a vessel being overtaken) of the maritime rules of the road, 33 U.S.C. 1602.

[4]Appellant has also, as he apparently did in connection with his appeal to the Vice Commandant from the law judge's decision, attached to his appeal brief several documents which are not part of the administrative record. Leave to file this material has not been sought, and it will not be considered.

[5]Specifically, we find no abuse of discretion by the law judge in his questioning of witnesses, and we decline appellant's invitation to rule on issues rendered moot by the Vice Commandant's dismissal of specifications 2 and 3.

[6]46 U.S.C. § 2101(40) defines a "towing vessel" as a "commercial vessel engaged in or intending to engage in the service of pulling, pushing, or hauling along side, or any combination of pulling, pushing, or hauling along side."

the fact that the statute, by its express terms, extends to certain vessels whether they are actually "engaged in" or are only "intending to engage in the service of" towing. He accordingly stated (Appeal Decision at 9):

> I will not regard this additional language as superfluous. Based on the statute's plain language, and absent any indication of other meaning in the legislative history, I conclude that Congress intended commercial vessels in the business of towing to be considered towing vessels within the meaning of the statute, whether or not actually engaged in pulling, pushing or towing alongside. Here, the M/V SEA VIKING was returning to Seattle from a towing job in Cherry Point, crewed appropriately for towing, and operated by a towing company.

In our judgment, the Vice Commandant's construction of the law is a reasonable one, given the imprecise language used to reflect the definition's scope, and appellant, aside from providing his opinion as to why the safety policies underlying the statute would not be thwarted by a narrower reading, has not offered any legislative history to refute the Vice Commmandant's position on the issue. We will, therefore, defer to the Vice Commandant's determination that at the time of the collision the M/V SEA VIKING "was in the service of towing and thus within the ambit of 46 U.S.C. § 8904" (Id.).

Appellant also challenges the Vice Commandant's rejection of his claim that the misconduct charge infringed his due process rights because he could not have taken a head break without violating either 46 U.S.C. § 8904, which obligated him to find a licensed replacement during his absence, or 46 U.S.C. § 8104(h), which, appellant contends, precluded him from asking the only

other licensed individual on board, namely, the captain, to take over for him because the captain had already worked the maximum number of hours the law allowed.[7] Assuming, *arguendo*, that a deprivation of due process can be said to occur in the circumstances urged by appellant, we find no merit in his insistence that these laws presented him with an unconstitutional Hobson's choice.[8]

As a starting point, we note that while, on trips lasting more than a day, it may not be possible, where only two licensed operators are aboard a towing vessel, for either operator to take a head break during his 6 hour watch without running afoul of one or the other of the two statutes, the Coast Guard appears not to have enforced such a reading of these laws. Rather, in apparent recognition of industry manning practices, it has engrafted an exception that allows an unlicensed crewmember of "*proven navigational competence*" to staff the helm during the operator's temporary absence. See Appeal Decision 2058 (SEARS)(emphasis

[7]46 U.S.C. § 8104(h) states that "[o]n a towing vessel to which section 8904 of this title applies, an individual licensed to operate a towing vessel may not work for more than 12 hours in a consecutive 24-hour period except in an emergency." In practice, this means that a licensed operator will typically work two 6 hour watches in the wheelhouse in one day, with a 6 hour rest period between watches.

[8]We note, moreover, that even though a violation of Section 8104(h) might have occurred had the captain taken over for the appellant while he went to the head, it does not appear that appellant could have been sanctioned for any such violation, as Section 8104(j) only holds the "owner, charterer, or managing operator of a vessel" accountable for such infractions.

added).[9] However, even if the Vice Commandant did not permit any deviation from the explicit letter of the law in this context, we would not agree that the appellant, or anyone similarly situated, had been placed by the Coast Guard in a constitutionally impermissible predicament.

Aside from the fact that the appellant's quarrel with the impact of 46 U.S.C §§ 8904 and 8104(h) is misdirected, as they are federal statutes (not, as he claims by counsel, Coast Guard regulations) adopted by the Congress that the Coast Guard is obliged to administer, the asserted due process quandary appellant says compliance with them posed was one of his, or of the towing vessel owner's, own making; namely, the decision to operate the vessel with fewer licensed crewmembers than was necessary to avoid the kind of problem appellant encountered. The Coast Guard is clearly not responsible for that management choice, and it is not, therefore, answerable for whatever unfairness appellant believes his asserted inability lawfully to leave his duty post may have created.

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[9]From the record it would appear that the appellant entrusted the helm to a crewmember of little or no navigational experience. In this regard, appellant's attempt here to establish that he had no reason to question the competence of the deckhand he asked to take over for him in the wheelhouse is beside the point, for the appellant had an affirmative obligation, under SEARS, only to entrust the wheel to a crewmember of demonstrated navigational ability. The proper discharge of that obligation was especially important in this incident, as appellant wanted to leave the wheel at a time of obvious navigational risk, in that his tug was steadily closing on another vessel, albeit apparently then on a parallel track, whose immediate future directional intentions were unknown.

ACCORDINGLY, IT IS ORDERED THAT:

1. The appellant's appeal is denied, and

2. The Vice Commandant's decision affirming the decision and order of the law judge is affirmed.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT and GOGLIA, Members of the Board, concurred in the above opinion and order.